F. M. S. REPORTS

[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

December 29, 1937.

[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J. (S.S.), CUSSEN & MURRAY-AYNSLEY, JJ.

August 9, 1938.

THE STATE OF PERAK....Plaintiff-Appellant

vs.

P.R.A.L.M.M. MUTHUKARUPPAN CHETTIAR .....Defendant-Respondent

[PERAK CIVIL APPEAL No. 1 of 1938]

Revenue — Estate Duty Enactment 1929 Sections 5, 6, 25 and 30—gift within 3 years of death—double duty—interest on double duty—Hindu joint family property — admission by Counsel made in error—withdrawal of admission on appeal—amendment of plaint—costs thrown away—rate of interest on decree.

A Chettiar died on the 4th December 1931 in India. In his life time he was a partner in certain money lending businesses in the State of Perak and the firms in which he was partner held monies belonging to him on thavanai account. In the year 1925 the deceased Chettiar who was then in India instructed the agent of the firm in Perak to transfer the moneys on Thavanai account to a Charity account in the books of the money lending firms in Ipoh. No money was paid to any charity and no notification of the transfer was given to any one. In the years 1928 and 1929 a new firm belonging largely to the deceased's son was commenced and the Thavanai moneys in question and also the deceased's shares in the money lending firms were transferred to Charity accounts in the new firm.

Held, by Aitken J. that the deceased had done all he could to transfer the Thavanai moneys to charity in his life time and that there was an effective gift thereof in the year 1925 and no estate duty was payable thereon but that there was no effective gift of the shares of the deceased in the money lending firms until the year 1929, and in consequence estate duty was payable thereon.

Held, on appeal from the finding of Aitken J. as to the thavanai moneys (by McElwaine, Chief Justice, Straits Settlements, and Murray Aynsley J.—Cussen J. dissenting) that there was no effective gift of the Thavanai moneys in the year 1925 and that the Thavanai moneys were given in addition to the shares in the year 1929 within 3 years of the deceased's death. and in consequence estate duty must be paid on the Thavanai moneys in addition to the shares.

Held also (by Murray Aynsley J. and Cussen J.—McElwaine, Chief Justice, Straits Settlements dissenting) that under Section 30 of the Estate Duty Enactment the Court had no discretion whether or no to impose double duty and that double duty must be paid.

Held also that as regards interest on estate duty the same was payable at 8% per annum on the double duty, not merely on the amount of single duty.

At the trial after certain evidence had been given on behalf of the defendant Counsel for the plaintiff stated that in view thereof he admitted that the property in question was joint Hindu Family property. The evidence in fact established that the property was separate and not joint Hindu Family property.

Held that the erroneous admission of Counsel did not conclude the matter but that the admission could be withdrawn, that in view of the contention of the defendant-respondent that but for the admission further evidence would have been called by the defendant-respondent at the trial there must be a retrial on that issue.

Held also that on an amendment of a plaint at the trial the proper order was that the plaintiff should pay the costs thrown away and occasioned by the amendment and not all the defendant's costs up to the date of the amendment.

Held also that while it was desirable that a uniform rate of interest of 8% per annum on decrees should prevail throughout the Federated Malay States the order of the Judge decreeing 5%, being in accordance with the practice then prevailing in the State of Perak, ought not to be set aside.

TRIAL OF SUIT.

Joaquim for the plaintiff.

The Hon. Dato Roland Braddell (*Seenivasagam* with him) for the defendant.

AITKEN, J.—The Defendant is the adopted son of the late P.R.A.L.M. Muthukaruppan Chettiar, who died at Paganeri in India on the 4th of December 1931.

It is alleged that the deceased, in the year 1929, made a gift to the Defendant personally, or to him as trustee for and on behalf of certain family charities, of property in the State of Perak to the value of $302,626.85 at the time of the gift; and that such gift was made within a period of 3 years before the death of the deceased. Founding itself on these allegations, the State of Perak claims that all such property must be deemed to be property passing on the death of the deceased, and therefore liable to estate duty as provided by Sections 4 and 5 of the Estate Duty Encatment No. 10 of 1929 as amended by Enactments Nos. 35 of 1931 and 8 of 1932.

The plaint actually claims double the amount of duty leviable, presumably on the ground that the Defendant did not deliver an account of the property comprised in the alleged 1929 gift within 6 months of the death of the deceased; see Section 30 (1) of the Enactment (No. 9 of 1929). In view however, of (a) the Defendant's consistent denial of any liability for any estate duty, (b) the many difficult questions of law which have to be decided before his liability and the extent thereof or his non-liability can be determined, (c) the complete failure of this suit in its original form and (d) the eventual reduction of the Plaintiff's claim, even on the amended plaint, by 50%, I should have found it impossible to treat this penal claim for double duty as serious had not counsel for the Plaintiff persisted in it right to the very end of the case . Since counsel's persistence has compelled me to treat it seriously, I may as well say, right away, that the mere suggestion that the Defendent has done anything in this case deserving of a penalty is so absurd that I shall give no further consideration to it.

Now the State bases its claim for estate duty on the alleged gift of 1929, and on that alone.

The original plaint and the amended plaint are perfectly consistent in that respect, and the amended plaint has pleaded no alternative ground of liability. The State must therefore prove that alleged gift if it is to succeed in establishing any liability for estate duty on the part of the Defendant in this suit, and that is a point which may conceivably be of some importance if this case is taken to a higher Court.

Having thus dealt very briefly with the State's claim, as set out in the amended plaint, it will be convenient if I deal equally briefly with the Defendant's amended defence. That is two-fold. In the first place he alleges that the deceased had given away all his property in the State of Perak to charity in the years 1925 and 1927, that is, more than 3 years before his death. In the second place he alleges that he and the deceased were members of a joint Hindu family governed by the Mitakshara school of Hindu law. All property owned by them, however acquired, was joint family property, and at the time of the deceased's death he and the Defendant were the only persons interested in such property as co-parceners. On this basis the defence proceed to argue, first of all, that any interest in joint family property which accrued to the Defendant on the death of the deceased was not liable to estate duty, because the Defendant took it by survivorship and not by succession. Assuming, however, that argument failed and that estate duty was payable on some of the joint family property then such duty was payable only to the extent to which the Defendant benefited by the cessor of the deceased's interest therein. Towards the end of the hearing of this case, counsel for the Plaintiff admitted that all the property in respect of which estate duty is claimed must be regarded as having been joint Hindu family property, in which the deceased and the Defendant had equal co-parcenary interests. It seems clear, therefore, that if any liability for estate duty has attached to the property in question, the estate duty payable must be calculated on exactly half its principal value at the time of the deceased's death; see Section 4 (i) of the 1929 Enactment as amended by Enactments Nos. 35 of 1931 and 8 of 1932 respectively.

From these very brief summaries of the parties' pleadings in this suit it is possible to state the main issues which arise thereout for my decision:—

Firstly, was there an effective gift to charity of any part of the deceased's property in the State of Perak in the year 1925?

Secondly, was there an effective gift to charity of any part of the deceased's property in the State of Perak in the year 1927?

If the answers to both these questions are in the affirmative and if the gifts so found to have been made comprise all the deceased's property within the State of Perak, then there is nothing further for me to do except to dismiss this suit with costs. If, however, the answer to one or both of these questions is in the negative, then a third issue arises for my decision, which may be stated as follows:—

Did the deceased make an effective gift of any, and if so, what part of his property in the State of Perak to the Defendant personally or as trustee in the year 1929? Should that question eventually arise for my decision and be answered in the affirmative then the State will be entitled to some part of the relief it seeks. On the other hand should that question arise and be answered by a finding that there was no such effective gift in the year 1929, then this suit will fail completely because, as I have already pointed out, the State bases its claim for estate duty on the alleged gift of 1929, and on that alone.

There is no dispute as to the facts of this case, but there is a great dispute as to the legal results which flow from those facts. Indeed, as counsel for the Plaintiff arrived in court without any evidence, oral or documentary, he found himself compelled to put in the evidence given by the Defendant and the Defendant's witness N. S. V. Somasundram on commission in India in support of the Plaintiff's case. The situation thus created was certainly curious and most unusual; but I take this early opportunity of saying that, in my opinion the Plaintiff's case has not suffered thereby since both these witnesses seem to have given their evidence with exemplary fairness and candour. I will first of all set out in narrative form, and as concisely as possible, the facts out of which this suit arises, and then deal with the contentions of the parties as to the legal results which flow from those facts.

The late P.R.A.L.M. Muthukaruppan Chettiar was a Hindu of the Nattukottai Chettiar caste and lived at Paganeri in the Ramnad District in India. Having no lawful and natural son of his own he adopted the Defendant, who was then a youth of some 18 years or so of age, in the month of January 1920. At that time the deceased was a man of very considerable wealth, and it is now common ground that all the property of which he was then possessed must be regarded as ancestral property in which he and his adopted son, the Defendant, became the only co-parceners in accordance with the Mitakshare school of Hindu Law as from the date of the latter's adoption. It is also admitted, I think, that he and the Defendant were members of an undivided Hindu family from that time onwards until his death on the 4th of December 1931; and that all accretions to the original ancestral property of the deceased, and all other property acquired by either of them up to that date, formed part of the joint family property in which he and the Defendant were the only co-parceners.

At the date of the Defendant's adoption the deceased was interested in two money lending firms, which carried on business the one at Taiping and the other at Bruas in the State of Perak under the same vilasam A.R.S.T.M. It will be convenient henceforward to refer to these firms as the Taiping firm and the Bruas firm respectively. Both of them were partnership firms, and in the Taiping firm the Deceased held 19 out of 53 shares, and in the Bruas firm he held 35 out of 90 shares.

In the year 1925 some discussion took place between the deceased and the Defendant in regard to the family charities which they, as members of an undivided Hindu family, were conducting in or close to Paganeri. The names of these charities sound somewhat strangely in European ears, and have been recorded differently at different times. However, the amended plaint and the amended defence are at one in regard to them, and so I think I can properly accept the spelling therein adopted. It is nowhere suggested that they were not in existence in the year 1925, and the version of their names which I have accepted is as follows:—

1. Vetheranniyam Auna Chuthiram;
2. Tirukalarkum Pusai Madam;
3. Thevara Padusalai;
4. Kalayar Kovil Tirumai Malai Padasalai, and
5. Pahaneri Thevara Koshti.

As a result of that discussion, the deceased and the Defendant resolved that the time had come when it was desirable to make some adequate endowment for these charities. To give effect to their resolution the agent of the Taiping firm was given certain instructions in a letter written to him on the 20th of May 1925 which, when translated into English, read thus:—

> "Make debit entries of the deficit in the old account according to shares against the respective partners, and enter credit of the amount standing to our credit as P.R.A. L.M. charity money. And adjust P.R.A. L.M.S account and send without delay copy of day book and interest statement from inception".

These instructions are rather less than clear according to European ideas of doing business, but the agent of the Taiping firm, who was also the agent of the Bruas firm, seems to have had no hestitation in reading them as a direction to him to transfer the amount standing to the credit of the deceased's "Thavanai" account in each firm to charity. Accordingly the agent, whose name is N. S. V. Somasundaram Chettiar and who gave evidence for the Defendant on commission in India, closed the deceased's "Thavanai" account in each firm, and transferred the balance then standing to its credit to a new "Charity" account. In the case of the Taiping firm, the transfer took place under date the 26th of June 1925, and a sum of $133,560.91½ was transferred to a new account entitled "Credit and debit Thavanai account of Pagageri P.R.A.L.M. Charity". In the case of the Bruas firm, the transfer took place under date the 15th of November 1925, and a sum of $11,652.75½ was transferred to a new account entitled "Credit and debit account of Paganeri P.R.A.L.M. Charity". I should here, perhaps, mention that "P.R.AL.M.", which was the deceased's vilasam, stand for the deceased in the accounts of these firms. The Defendant's vilasam is P.R.A.L.M.M., and in certain accounts of the A.M.S.P. money lending firm to which I shall have to refer later on, the Defendant is represented by that Vilasam.

On behalf of the Defendant it is contended that these two transfers constitute a valid gift of the sums of money therein mentioned, and all accretions thereto since the respective dates of transfer to charity. On behalf of the Plaintiff it is contended that these two transfers do not constitute a gift to charity. I will deal with those contentions and the arguments adduced to support them when I have completed this narrative of fact.

It is to be observed that the transfers made from "Thavanai" accounts to "Paganeri P.R.A. L.M. Charity" accounts in the firms' books in the year 1925 do not concern or touch upon the deceased's share of capital and assets in the two firms. As I understand the position, the deceased's "Thavanai" account in each firm was the account of moneys he had lent to that firm at interest, and of the profits and losses he made in respect of such loans. It cannot be contended, therefore, that these transfers, taken alone, in any way affected what may be termed the deceased's share capital in the Taiping and Bruas firms; and I take this opportunity of simplifying the issues before me by stating that, in my opinion, there is no evidence to support Mr. Braddell's contention that in 1925 the deceased made an effective gift of that share capital to charity.

It is, however, contended on behalf of the Defendant, that in the year 1927 an effective gift of such share capital to charity was made by the deceased and the Defendant, and since there is no documentary evidence of any description in support of that gift, it must stand or fall by the oral evidence of the Defendant and N. S. V. Somasundaram Chettiar given on commission in India. It is necessary, therefore, to set out the relevant passages in that evidence.

The relevant passage in the course of the Defendant's evidence appears to be that at pages 13 and 14 thereof, which reads as follows:—

"We thought even when we considered and resolved to make an endowment and wrote Exhibit I (i.e. letter of May 20th 1925) that the share of P.R.A.L.M. in the two firms should also be transferred to the charities. We did not communicate to the agent by letter our intention to transfer the said shares in the two firms to charities. But my recollection is that when the agent Somasundaram Chetty came home in the year Akshaya (i.e. 1927), my father personally mentioned to him that his shares in the two firms were also resolved to be transferred to charities. In none of the letters written by agent Somasundaram Chetty to us after he returned to Taiping and Bruas did he refer to the conversation or the assignment of the shares to charity. It is not necessary that the partners should be apprised of the transfer of the shares from personal ownership to charity and so we did not write to partners. Nor did we instruct the agent Somasundaram Chettiar to inform the partners of the same. When we intended to transfer the shares to charity we thought that the charity should have the benefit of the profits, whatever that may be, and similarly subject to the liability or losses, if any, that the firms might earn or incur after Vaikasi Krodana (i.e. May 1925) but not of the profits or losses earned or incurred earlier".

The relevant passage in the course of N. S. V. Somasundaram's evidence requires a little explanation to render it intelligible at this stage. It is common ground that there is no documentary evidence of the alleged gift of the deceased's share in the capital and assets of the Taiping and Bruas firms to charity before the month of August in the year 1929. In that month and year the Taiping and Bruas firms were wound up, and the capital and assets divided between the partners thereof by arbitration. The arbitrators' award is dated the 27th of August 1929; and the lands, charges moneys, choses in action, book debts and other properties thereby awarded to the deceased, in respect of his share capital in those firms, were handed over to one Kanappa Chettiar as agent of a new money lending firm doing business at Taiping under the Vilasam A.M.S.P. In the capital of that new firm the Defendant held 10 out of 16 shares, and the values of the properties so handed over were credited to an account in that firm's books entitled "Account of Paganeri P.R.A.L.M.M. charity money".

Bearing these facts in mind, the following passages at pages 4, 5, 6, 8, 9, 10 and 11 of the evidence given on commission by N. S. V. Somasundaram Chettiar appear to be those relevant to this alleged gift of the deceased's share capital in the two firms to charity in the year 1927.

"Q. Was the A.R.S.T.M. firm continued after your agency or what became of it?

A. The firm was divided among its partners.

Q. Was it divided between partners amicably or through arbitration?

A. It was divided through arbitration.

Q. What did Muthukaruppan Chetty get for his share?

A. He got for his share in the shape of outstandings, lands and houses.

Q. To whom did you hand over all the outstandings and the properties?

A. To one Kannappa Chettiar alias Kasi Chettiar.

Q. Who was this Kannappa Chetty?

A. He had come as agent of A.M.S.P. firm of Taiping. It was a partnership firm between Muthiah Chettiar's family and Muthukaruppan Chettiar's family.

Q. In what manner did you hand over the share capital and the share of the assets to that Kannappa Chetty?

A. I transferred the whole thing to the charity account in my account, and handed over the same as charity account to that Kannappa Chetty.

Q. Why did you transfer the share of the assets of Muthukaruppan Chetty to charity accounts before you handed over to Kannappa?

A. When I had come to India on account of my son's marriage I asked my principal as to why he wrote Exhibit I (i.e. the letter of the 20th of May 1925) to have the amounts transferred to charity accounts, and he said that they have set apart the whole firm for charity and gave instructions also while I took leave of him and so I entered the accounts in that manner. I had come to my village in Prabava year (i.e. 1927-1928) for my son's marriage.

Q. Exhibit VI is shown to the witness. Was this received by you?

A. Yes. This is the letter sent to me through Kannappa Chettiar.

Q. In whose name did the documents relating to the firm's property stand?

A. They stood in my name.

Q. Have you executed any documents relating to those properties in favour of Kannappa?

A. Yes. I have executed the necessary documents to Kannappa."

"Q. Read Exhibit I (i.e. letter of 20th of May 1925) and let me know what it directs you to transfer to charity.

A. The letter directed me (that is what I understand when I received the letter then) to transfer the entire interest of Muthukaruppan Chettiar in the partnership firm and not merely the moneys then to his credit, to charity.

Q. When did you act upon that letter?

A. The letter I was of date 7th Vaikasi, Krodana (i.e. the 20th of May 1925). I carried out the direction on 13th Ani. (i.e. 26th of June 1925) as for 30th Vaikasi Krodana. See page 56 of Exhibit II. It transfers to charity only the amount that was then in the firm in the Thavanai account of Muthukaruppan Chettiar (father).

Q. Did you transfer the share capital or his interest in the partnership to charity?

A. No.

Q. Why did you not transfer the share capital or his interest in the firm to charity?

A. Exhibit I (i.e. the letter of the 20th of May 1925) did not mention about the transfer of the share or his share capital.

Q. What was the occasion for you to ask your principal, Muthukaruppan Chettiar, about this transfer?

A. I thought the amount in the Thavanai account was a large sum and the whole thing was transferred to charity, and so asked the master why you transfer the whole of this large sum. The master answered that he has resolved to set apart the whole of that sum and all his rights in the firm to charity.

Q. You mentioned that the sum in the Thavanai account was too large to be transferred to charity and so you put the question to your master. Was it not then astonishing that not only that amount but all his interest in the firm also was to be for charity?

A. He was the owner; he could do anything he pleases and so I did not put any further question to him.

Q. Did you ask him, why did you not then write to me in Exhibit I (i.e. the letter of 20th of May 1925) that the whole of his interest in the firm was also transferred to charity?

A. I asked; Muthukaruppan Chettiar told me that he thought that his share of the assets might be taken over to charity when the firm would be closed and his share divided, and so he did not write.

Q. Did you ask him for any written instructions for transfer?

A. No. He did not write to any such effect in any of his letters to me except Ex. VI.

Q. Read Exhibit VI. Is there any direction that his share or interest in the partnership firm to be transferred to charity?

A. No.

Q. Then what was your authority?

A. The oral direction of my master during my visit to India in the year Prabava. (i.e. 1927-1928).

Q. When did you return to Taiping?

A. In Prabava, Margali. (i.e. December 1927).

Q. When did you take into the charity accounts his share of the assets?

A. In the year Sukia in Avani month. (i.e. August 1929)."

The evidence of N.S.V. Somasundaram Chettiar is not entirely consistent in itself, and parts of it are not entirely consistent with the passage I have quoted from the Defendant's evidence, nevertheless I think it is reasonably clear what really happened. In or about May 1925 the deceased and the Defendant resolved to transfer the moneys standing to the deceased's "Thavanai" accounts in the Taiping and Bruas firms to charity, and instructions to make the necessary changes in the firm's books were given to the agent Somasundaram by the letter of the 20th of May 1925 a copy of which is annexed to the Defence. No instructions were given then in regard to the deceased's interest in the capital and assets of those two firms, but in the year 1927 Somasundaram happened to pay a visit to India in connection with his son's marriage, and during that visit the deceased told him that it had also been resolved to transfer his interest in such capital and assets to charity as soon as those two firms were dissolved—an event which was then in contemplation. Accordingly, when the dissolution took place in August 1929, new accounts were opened in the books of the Taiping and Bruas firms respectively, showing that all such assets as were awarded by the dissolution arbitrators to the deceased in respect of his share in the capital and assets therein were transferred to "Paganeri P.R.A.L.M. Charity."

It is on these facts that counsel for the Defendant contends that there was a valid gift

of the deceased's interest, in the share capital and assets in the Taiping and Bruas firms, to the five charities I have already named in the year 1927. On the other hand, founding his argument on the same facts, counsel for the Plaintiff contends that no valid gift to charity of the deceased's interest in such capital and assets took place until the year 1929. Here again I will postpone my consideration of these contentions until I have completed my narrative of fact.

Nothing further of importance occurred during the year 1927, and the next date to which reference must be made is the month of June 1928. In that month a new money lending firm began doing business in Taiping under the vilasam A.M.S.P. The Defendant seems to have been the moving spirit in its formation though he acted throughout with the knowledge and consent of the deceased, and he held 10 out of the 16 shares into which the $16,000/- share capital was divided. His three partners held 2 shares each in the remaining 6 shares, and my impression is that this new firm was set going with a view to taking over the deceased's share of the capital and assets of the Taiping and Bruas firms when their dissolution had become a *fait accompli*. A certain Kannappa Chettiar was appointed the agent of this new firm, and he appears to have received his instructions from the deceased and the Defendant at Paganeri under the deceased's vilasam.

As showing the close and early connection between the old A.R.S.T.M. firms (the Taiping and Bruas firms) and this new A.M.S.P. firm, it is convenient here to mention that the following moneys were transferred from the "Thavanai account of Paganeri P.R.A.L.M. Charity" in the ledger of the Taiping firm to the account of "Paganeri P.R.A.L.M.M. charity money" in the new firm:—

On 13th of June 1928 - -	$22,500
On 14th of December 1928 -	7,500
On 13th of March 1929 - -	11,400
On 13th of June 1929 - -	7,600
On 3rd of August 1929 - -	11,400

The last four of these transfers were all made on dates within a period of 3 years before the deceased's death, and it is therefore claimed that they are all liable to estate duty. All these sums of money, however, form part of the "Thavanai" moneys which according to the Defendant, were given to charity in the year 1925, and of the interest which accrued thereto; and if the Defendant's contention is upheld on that point, then it seems clear that the Plaintiff's claim in respect of these last four transfers must fail. The A.M.S.P. Ledger and the letters we have in evidence in the bundle Exhibit X, show that all the sums of money so transferred were treated as charity moneys by both the transferor and the transferee.

The next date of importance is the month of August 1929. About the beginning of that month three Chettiar gentlemen were appointed to effect a division of the capital and assets of the Taiping and Bruas firms amongst the partners in the same, and on the 27th of that month they published their award. By virtue of that award assets of these two firms consisting of lands, houses charges, decrees, promissory notes, I.O.U's and other choses in action to the estimated value of $256,910.90 were transferred to Kanappa Chettiar, as agent of the new A.M.S.P. firm, and credited in its books to an account entitled "Paganeri P.R.A.L.M.M. charity Thavanai account." To the same account there was also credited a sum of very approximately $45,715.95, which appears to represent the amount standing to the credit of the "Paganeri P.R.A.L.M. Charity accounts" in the Taiping and Bruas firms at the time of their dissolution. I use the words "approximately" and "appears to represent" advisedly, as I have found it impossible to make a complete reconciliation of the figures given me on behalf of the Plaintiff and the Defendant in that respect. I also suspect that there are still several small errors in the translation of the relevant accounts which is in evidence as Exhibit Y. During the hearing several such errors were detected and corrected; but as there was no real dispute about the totals so transferred, a great many figures in that translation were not subjected to any careful scrutiny. If I have fallen into error in regard to this figure of $45,715.95, it is of some comfort to me to know that in the view I take of this case the possibility of error in that respect does not matter. Even if the other figure of $256,910.90 should prove to be less than exact, it can easily be corrected in the working out of my judgment.

To complete my narrative of fact one other date, and one date only, is necessary. The late P.R.A.L.M. Muthukaruppan Chettiar, to whom I have hitherto referred on many occasions as the deceased, died at Paganeri in the Ramnad district in India on the 4th of December 1931.

At this stage of my judgment, when the way is clear for a decision of the three questions which remain for my decision on the foregoing facts, it will make for clarity if I set them out clearly and concisely before I proceed to consider and answer them one by one. They are as follows:—

Firstly, was there an effective gift to charity of the moneys standing to the credit of the deceased's Thavanai accounts in the Taiping and

Bruas firms in the year 1925? If there was such a gift, then I do not think that it can be denied that all future profits earned by those moneys in the money lending business, whether by the Taiping and Bruas firms or any other money lending firms, must be regarded as being comprised in that gift.

Secondly, was there an effective gift to charity of the deceased's interest in the capital and assets of the Taiping and Bruas firms in the year 1927?

Thirdly, and this question only arises if the answer to one or both of the preceding questions is in the negative, was there an effective gift by the deceased to the Defendant, either personally or as trustee, of any part, and if so what part of the deceased's property within the State of Perak in the year 1929?

The learning and industry of counsel on both sides has furnished me with a wealth of authority and argument on all these questions, and I trust that I shall not be considered as lacking in respect for that learning and industry if I do not, in this judgment, specifically refer to any of those authorities and deal with only a few of those arguments. My duty is to decide the questions which await my decision, and not to attempt a treatise on the law of gifts *inter vivos*. If I am wrong—and it seems to me very possible that on some of these questions even the most painstaking judges may arrive at different conclusions—then there is a Court of Appeal to correct my errors and the Privy Council to correct theirs.

Now as to the first of these three questions, in my opinion there was an effective gift to charity in the year 1925 of all moneys standing to the credit of the deceased's Thavanai accounts in the Taiping and Bruas firms. I am also of opinion that that gift comprised all interest and other accretions earned by those moneys since the date of their respective transfers to the P.R.A.L.M. charity account in the books of the two firms. It may, perhaps, be helpful to add that, in arriving at this conclusion, I have been influenced by the fact that in this case we are dealing exclusively with Chettiar societies, Chettiar partnerships, Chettiar accounts and Chettiar charities. Had we been dealing with English societies, English partnerships, English accounts and English charities, the result might have been a different one.

As to the second of these questions, on the evidence before me I have come to the conclusion that in the year 1927 the deceased went no further than to express an intention to transfer his interest in the share capital and assets of the Taiping and Bruas firms to charity when those firms were wound up. In my opinion such an expression of intention was insufficient to operate as an equitable assignment of such interest until the dissolution of the two firms in the year 1929. I cannot accept Mr. Braddell's contention that nothing could have been done in the firms' books, in the year 1927, to indicate that intention, in view of the fact that something was done in those books to indicate the same in the year 1929. I am also of the opinion that the transfer of sums of money from the Thavanai P.R.A.L.M. charity account in the Taiping firm, to the P.R.A.L.M.M. charity account in the A.M.S.P. firm, does not indicate any gift to charity of the deceased's share in the capital and assets of the former.

As to the third question, I am of opinion that there was a valid gift to the Defendant as trustee for charity of the deceased's co-parcenary share in the capital and assets of the Taiping and Bruas firms in the year 1929, and therefore within a period of 3 years before his death on the 4th of December 1931. An affirmative answer to this question seems to follow necessarily from my affirmative answer to the first question; and I have already explained, earlier in this Judgment, how the quantum of of the gift is arrived at. It is interesting to note, however, that the principal argument advanced by counsel for the Plaintiff against an affirmative answer to the first question tells with equal force against an affirmative answer to this third question. I am now referring to Mr. Joaquim's contention that the charities to be benefited are merely family hobbies and too vague to be the proper objects of a charitable gift.

Before I conclude this judgment I must mention Mr. Braddell's contention that, even if the Defendant should be held to be accountable for estate duty as a trustee for charity to whom property was given within a period of 3 years before the deceased's death, yet Section 20 (iii) of the Estate Duty Enactment No. 10 of 1929 does not render him liable to pay that estate duty. All that I need say on that contention is that the sub-section in question seems to me to state, quite definitely that every trustee, to the extent of the property actually received by him, shall pay the estate duty to which the same is, under the Enactment, liable. It would be a strange result if a Taxing Statute were construed so as to render a person who has received property liable to estate duty accountable for that duty but not liable to pay it. If Mr. Braddell's contention was adopted by the Court, no one would be liable to pay the estate duty which is admittedly due, on my findings to the State of Perak.

On the above findings the State of Perak is entitled to a declaration that the Defendant is liable to pay estate duty on half the property which passed to him as trustee for the five

charities in and around Paganeri, whose names need not be repeated here, in the month of August 1929. At that date the total value of such property was, according to the dissolution arbitration, $256,910.90; but the deceased died on the 4th of December 1931, and it is on one half part of the value of such property at this latter date that the estate duty I have found to be payable must be calculated. Between August 1929 and December 1931, there was a great depreciation in the value of property of every kind throughout Malaya, and if the parties cannot agree as to the property in respect of which estate duty is payable in accordance with this judgment, and the principal value thereof on the 4th of December 1931, there must be an inquiry for the purpose of ascertaining the same before the Assistant Registrar.

There must be judgment against the Defendant for the amount thus found to be due on account of estate duty, and such decretal amount will bear interest at the rate of 8% per annum from the 4th of June 1932 until the date of this judgment; and there must be judgment for the amount of such interest accordingly. From and after the date of this judgment the total sum so adjudged to be due from the Defendant to the State will bear interest at the rate of 5% per annum until payment.

I have already disposed of the costs of this action up to the 16th of December 1937 by my ruling of that date granting the State of Perak leave to amend its plaint. As the State has achieved a substantial, though only partial, success on its amended plaint, I am inclined to order the Defendant to pay one third of its costs of the action from that date onwards; but I will hear counsel on that point before I finally decide it, if any one of them wishes to be heard. In working out this judgment the Defendant will be at liberty to set off the costs awarded to him against the costs he has to pay, and if the balance is in his favour as I expect that it will be, he may set off such balance against the sum he has to pay on account of estate duty.

Judgment accordingly.

The plaintiff appealed against the order of Aitken, J.

The Hon'ble Mr. E. D. Shearn for the appellant.

H. D. Mundell (*Ramani* with him) for the respondent.

McELWAINE, C.J. (S.S.)—This is an appeal from so much of the Judgment of Aitken J. as decided:—

1. That the shares of P.R.A.L.M. Muthukarappan Chettiar (hereinafter called the deceased) in the firm of A.R.S.T.M. at Taiping (hereinafter referred to as the Taiping firm) and in the firm of A.R.S.T.M. Bruas (hereinafter referred to as the Bruas firm) were held by the deceased as joint Hindu family property;
2. That there was an effective gift to charity of the moneys standing to the credit of the deceased's Thavanai accounts in the Taiping and Bruas firms in the year 1925;
3. That the judge had a discretion in refusing to decree payment of the double duty claimed by the State;
4. That without amendment the plaintiff's suit would certainly fail, and that the plaintiff should be ordered to pay all the defendant's costs up to the date of the order giving leave to amend the plaint, i.e., up to and including the 16th December 1937;
5. That in the absence of agreement between the parties an enquiry must be held to ascertain the value at the death of the deceased of the deceased's interests in the Taiping and Bruas firms;
6. That interest on the amount payable under the judgment should be at the rate of 5% per annum and not at the rate of 8% per annum;
7. That the defendant should only pay one-fourth of the plaintiff's taxed costs as from 16th December 1937.

The appellant claims that the deceased's shares in the Taiping and Bruas firms were not joint family property. The firms were started in 1904 and 1914 respectively.

The deceased was a member of a joint Hindu family with his brother. The joint family property was partitioned between them in about 1918. The Taiping and Bruas properties were not partitioned which is strong evidence that the deceased's interests in these two firms were not joint family property but were his separate undivided property.

In 1920 the defendant was adopted by the deceased as a son and a new joint Hindu family came into being, the family being the deceased and the defendant.

It was admitted that the deceased's share of the property which was partitioned remained ancestral property and became the joint family property of the new family composed of the deceased and his adopted son the defendant. As it was put by Sir Alladi Krishnaswami Iyer, Advocate-General of Madras who gave expert evidence for the defendant on commission in India as to the Mithakshara law relating to joint families "an adopted son acquires an interest in the ancestral heritage as a natural son acquired an interest in it by birth, even though the adopter is the sole owner of the property, prior to the adoption." See too *Mulla's* Hindu Law 8 Ed. para. 223.

But ancestral property does not include self-acquired property and the deceased's interest in the Taiping and Bruas firms is alleged to have been self-acquired and if this is correct the deceased's interest in the Taiping and Bruas firms did not become joint family property on the adoption of the defendant.

On the formation of the new joint family there was admittedly a nucleus of ancestral property, namely, the share deceased acquired on the partition from his brother; and it was argued by Mr. Mundell that once a nucleus is established the onus is on those who assert that any property held by the deceased is not also ancestral property.

The onus certainly is on those who assert that property acquired after a partition was separate estate and was not an accretion to the ancestral property (*Lal Bahadur* v. *Konhaija Lal* I.L.R. 29 All. 675) and there is also a presumption that property of which the family were possessed is joint family property if it is proved that the family possesses any joint property. *Mulla*, para. 233 (2).

In the present case the property in the Taiping and Bruas firms was acquired during the continuance of the joint family of which deceased and his brother were at the time the members, so the presumption arises, though the nucleus which arose from the partition in 1918 had not yet come into existence.

The cogency of such a presumption varies with the facts of each case and in the case before us there are two pieces of evidence which rebut the presumption.

There is the evidence that when the brothers partitioned the joint family property the deceased's interest in the Taiping and Bruas firm was not partitioned. That is strong evidence that the brothers did not regard this property as joint family property. There is the evidence of the defendant "I learnt that my father served as agent of some big firms and earned much, and that his principals being very much pleased took him as a partner and my father became wealthy."

This is a strong indication that the deceased had self-acquired property which did not arise out of joint family or ancestral property.

Adding to these pieces of evidence the fact that in a statement sworn by the defendant on the 28th November 1935 before an Estate Duty Officer no suggestion was made that the Taiping and Bruas properties were joint family property, (indeed he says "the money definitely belonged to my father") I think there was strong evidence that these properties were self-acquired and were not joint family property. There is no evidence that the deceased "blended" his Taiping and Bruas property with the joint family property, which distinguishes this case from *Radhakant Lal* v. *Naymo Begum* I.L.R. 45 Cal. 733.

The defendant in his evidence says that the property was joint, but there is no evidence to bear this out such as would be provided by shewing that it had been treated as joint or otherwise bringing it into or merging it with the nucleus of what was admittedly joint family property.

If the record stopped there, I would think the evidence strongly indicated that the deceased's interest in the Taiping and Bruas firms was separately acquired property and was not joint family property.

But during the trial before Aitken J. counsel for the State made the following admission:—

> "I admit that this last witness has altered my view of the case, and that there is now sufficient evidence of a nucleus of ancestral property before the Court. The deceased's interest in the A.R.S.T.M. firms (i.e. the Taiping and Bruas firms) must therefore be regarded as ancestral property in which the defendant had a co-parcenary interest."

The witness referred to was Suppiah Chettiar. He spoke of the partition between the brothers, mentioning the properties divided and his list did not include the Taiping and Bruas firms. I can see nothing whatever in this witness's evidence to justify the admission or to alter counsel's view of the case. The fact that there was a nucleus of ancestral property does not appear at any time to have been seriously disputed and if counsel's admission is based on the proposition that once it is established that there was a nucleus of ancestral property then there could be no separate property, he was clearly wrong in law.

After the Order of Aitken J. was drawn up and signed Mr. Shearn gave notice to the solicitor for the defendant that he withdrew the

admission made by the counsel who appeared at the trial and in the memorandum of appeal the appellant asks leave to withdraw the admission.

I doubt whether on an appeal against a judgment an admission can be withdrawn.

Many cases were cited to us on the authority of counsel to consent to orders. Some of them are reviewed by McCardie J. in *Welsh* v. *Roe*, 87 L.J., K.B. 520. The cases in which such an order can be withdrawn appear to indicate that there is power in the Court to set aside the consent before but not after the order of the Court has been drawn up. Once the order of the Court is made the Court is *functus officio*. At this stage an admission of fact can, I think, only be got rid of by an action to set aside the judgment as in the case of a judgment by consent: *Ainworth* v. *Wilding*, (1896) 1 Ch. D. 673.

It is argued that the Court has power to review its own order under section 579 of the F.M.S. Civil Procedure Code, and that though no application was made to the trial judge to review his order, the Court of Appeal can do so as an appeal is a rehearing. It is unnecessary to express any opinion upon this argument. The officer representing the Estate Duty Commissioner was not in Court and there was no one who could repudiate the admission present when it was made which distinguishes the present case from *Colledge* v. *Horn*, 3 Bing. 119 and other cases noted in 2 *Halsbury* 2nd Ed. section 718.

Then Mr. Shearn argued that the admission was an error of law and as such is not conclusive. He referred to *Ran Kant Chowdky* v. *Brindabun Chunder Das*, 16 W.R. 246 and *Tejir* v. *Tejir* (1880) I.L.R. Supplementary Volume for 1872—3, p. 47. He also referred to an unreported case in the Court of Appeal (Perak Civil Appeal No. 10/29—*Foo Nghit Tse* v. *Tan Yok Wah*) in which plaintiff's counsel had admitted in Court in the absence of his client that the defendant was in lawful occupation of certain land and that the counsel had no authority to make such an admission. In the Court of Appeal the plaintiff appellant filed a motion for leave to withdraw this admission. Leave to withdraw the admission was granted and a new trial was ordered.

In *P.M.N.T. Ramasamy Chetty* v. *Syed Alsagoff*, 7 F.M.S.L.R. 93, Thorne J. at p. 120 said:—

> "Counsel for the respondent at the hearing below conceded that the respondent was the representative in interest of her own nominees, namely, the persons named in the transfers to the appellants as transferors. In the Court of Appeal Counsel submitted that there was an erroneous view of the law and that the respondent could be heard to say, notwithstanding this statement or admission, that it was erroneous. I incline to the opinion that this submission is correct. It seems to me that the statement of counsel below amounted to no more than that his opinion on the facts proved was that the respondent was the representative in interest of his own nominees and that he did not propose to argue that they were not. I think that the respondents are now at liberty to urge that this opinion was incorrect."

This passage which gives fuller reasons than Farrer-Manby J. gave at p. 115 for allowing the withdrawal appears to me exactly in point. The admission of counsel below appears to have been erroneous in law. But I would go further and say that as an admission it differs from ordinary admissions which may be said to be evidence of matters of which the Court had not full knowledge such as the admission in *Hallen* v. *Worman*, 3 L.T. (N.S.) 741 and *Urquhart* v. *Butterfield* 37 Ch. D. 357. In this case counsel's admission introduced no new evidence. Had he stated that further enquiry had satisfied the Commissioner of Estate Duty that the property was joint family property, it would have been very different.

He gave his own opinion of the facts proved. "The last witness has altered my view." There was no reason why the last witness should have altered the views of the Judge on the evidence before him. The admission was accepted by the Judge and forms the basis of this part of his judgment.

In my opinion this Court should disregard the admission on the grounds that it was an erroneous statement of law no more binding or authoritative than many other bizarre propositions of law to which Courts have to listen.

I would go further and treat the admission as evidence of opinion on a matter of fact supposed to have been proved and regarded in this light. I would say that the finding that the Taiping and Bruas properties were joint family property of the deceased was against the weight of the evidence on record.

But Mr. Mundell has informed us that he was instructed that had the admission not been made the defendant would have called further evidence with a view to establishing that these properties were joint family property but that such evidence was not called because of the admission.

If the defendant thinks he can still establish that the Taiping and Bruas properties

were joint family property, there must be a new trial on this issue.

The second ground of appeal is against the finding that there was an effective gift to charity of the moneys standing to the credit of the deceased's Thavanai accounts in the Taiping and Bruas firms in the year 1925.

The items, upon which Estate duty is claimed under this part of the appeal are the following transfers from the Taiping account:

14.12.1928	.. ..	$ 7,600.00
13. 3.1929	.. ..	11,400.00
13. 6.1929	.. ..	7,600.00
3. 8.1929	.. ..	11,400.00
29. 8.1929	.. ..	107.31
12. 9.1929	.. ..	5,500.00
12. 9.1929	.. ..	2,108.63¾
		$45,715.94¾

all of which transfers were made to the defendant's charity account with A.M.S.P. Chettiar, Taiping, a firm in which the defendant had a substantial interest but the deceased had no interest. All these transfers were made within three years of the death of the deceased so they were liable to pay estate duty unless it can be shewn that they had been effectively given to charity by the deceased before he transferred them to the defendant's charity account, and more than three years before his death. The respondent's case is that these transfers did not in themselves amount to charitable gifts, that the sums had long before been dedicated to charity and that the transfers from the deceased's accounts to that of the defendant's were only transfers from one trustee to another for devotion to the same charitable purposes.

The basis of the alleged gifts is a letter written on 20th May 1925 by the deceased to one Somasundaram (who was agent for the Taiping and Bruas firms) directing him to "enter credit of the amount standing to our credit as P.R.A.L.M. charity money and adjust P.R.A.L.M's account." This instruction was thus referred to by Somasundaram in his evidence "I received a letter from him" (meaning the deceased) "asking me to close the amounts in his accounts and credit the same in P.R.A.L.M. charity account."

On 26th June 1925 deceased had standing to his credit in his Thavani account with the Taiping firm the sum of $133,560.91½. On the same day pursuant to the above letter Somasundaram debited this sum to deceased's Thavani account and credited it in a new account with the Taiping firm called "account of Pajanari P.R.A.L.M. (i.e. deceased) Charity."

On 15th November 1925 deceased had with the Bruas firm an account styled "extra contribution to capital" in which he had a credit of $11,652.75½ which was transferred on that date to a new account with the Bruas firm called P.R.A.L.M's charity account. On 21st December 1925 the firm's account was credited and debited with a further $4,622.63½ and the new account was credited with this additional sum.

This Taiping "Charity" account contains many entries by which interest at specified rates was credited. It shews no disbursements for any charitable purpose.

The Bruas charity account contains similar credits of interest. It shews no disbursements for charity.

Each of these accounts shews certain large debits for purposes which do not appear to be charitable, but the amounts are in each case re-credited, except a debit of $23,000 on 15th September 1926 in the Taiping account which is credited on 26th November 1926 to defendant's charity account with A.L.M.N. Parit Buntar. The question is, are these amounts credited in these accounts effective gifts to charity? If they are, then the seven sums above set out were effectively given to charity more than three years before deceased's death and so escape Estate Duty. If the amounts credited in these Taiping and Bruas accounts were not effective gifts to charity, then the seven sums are liable to Estate Duty.

No particular charity is named in these accounts and the appellant contends that the deceased merely set aside certain moneys for nebulous charitable purposes and was under no legal obligation to apply them to such purposes.

The Respondent says that the moneys were effectively given to five family charities which the defendant specified in his statement to the Estate Duty Commissioner on 28th November 1935, namely:

(1) Vetharanniyam Anna Chaittiram (feeding the poor)
(2) Tirukalar Kuru Pushi Medam (worshipping place)
(3) Tevara Padesali (school)
(4) Kaliyar Kovil Tirunai Mali Pedasalai (school)
(5) Parkaneri Tevar Koshdi (worshipping place)

This is the defendant's idea of what the deceased intended to benefit from his "charity accounts" but so long as these accounts were in the deceased's control no payment was made out of them to any of the above charities though support has been given to them by the deceased out of other funds in India which are not ger-

mane to this case. No such gifts have been debited to the accounts in this case.

Mr. Mundell says that two of these charities are referred to in the deceased's letter of 20th May 1925 to Somasundaram in the following paragraph:—

> "The house warming ceremony for the Vedaranyan Choultry (feeding the poor) is fixed for the 14th instant. The house warming ceremony for the Thirukkaral Kurupiyai Thevaram Patasali (free religious school) is fixed for Wednesday 21st instant."

Variants in spelling I would expect, but the names, particularly that of the second charity, seem substantially different to those mentioned by the defendant. In any case there is no statement that these are the charities for which the charity accounts were opened The defendant seems to have regarded himself as a party to these gifts and if the money was joint family property he would have been justified in so regarding himself because joint family property might stand for managing purposes in the name of the head of the joint family alone. But, for the reasons given on the first ground of appeal, I cannot regard it as established that this was joint family property. The indications, so far as the evidence goes, point to it being separate self-acquired property.

The defendant in evidence said "beyond entry in the accounts now produced, there is no document either an endowment trust deed or any written memorandum to shew the endowment we made of these moneys to charities." He also admitted that they did not communicate to the trustees or the authorities concerned with the religious institutions in the places where the charities were conducted nor did they mention that properties or what properties were transferred or kept for the several charities. There was no division or apportionment of the amounts for each charity separately.

The deceased was described by the defendant as a "sort of trustee" looking after the family charity. There is no evidence of the constitution of the charities.

Now charity in the abstract is not a persona: *Re Jeffries, Finch* v. *Maston* (1936) 2 All E.R. 626 and a gift to a charity must be a gift to some incorporated charity or to some person on behalf of the charity. Mr. Mundell, as I understood him, argued that the money was assigned by the deceased to himself in his capacity as a trustee for the charities, that he in fact declared a trust.

The transaction is far too indefinite. I see nothing to prevent the deceased making generous gifts out of the account to Dr. Barnado's Homes, the National Life Boat Institution, St. Andrews Mission Hospital or to any other charitable institution. Would such gifts constitute a breach of trust? Had he purchased a motor car for himself or used the money in any other way for his own purposes, could he have been prosecuted for criminal breach of trust? I cannot conceive such a prosecution succeeding. Who is the beneficial owner? What is the trust? To make a good gift when the donor does not deprive himself of control of the money—and here he did not deprive himself of control because he was able to transfer it to the defendant's charity account in A.M.S.R. in 1929—there must be words sufficient to create an effective trust. *Hunter* v. *Attorney-General* (1899) A.C. 309.

The alleged gift was not communicated to the charity. Even if the deceased was in the nature of a trustee for the five family charities, those charities are not in any way indicated in the deceased's charity accounts with the Taiping and Bruas firms.

If this "charity account" was a gift, it rested merely on promise or unfulfilled intention and imperfect.

Mr. Mundell argued that if there was not a gift there was a declaration of trust which is the equitable equivalent of a gift. But the intention to declare a trust may be incomplete or the object or objects intended to be benefited may not be sufficiently ascertained and in none of these cases will the gift be upheld: 15 *Halsbury* 2nd Ed., section 1279.

This part of the case has occasioned me a great deal of anxiety.

Mr. Mundell has referred us to several Indian cases on Indian trusts for Indian charities. But we have to consider a document in the books of a Perak firm relating to property in the Federated Malay States and whatever may be the law as to Hindu trusts and charities in India I see no reason why those concepts should be applied in the Federated Malay States in the absence of local legislation.

It appears to me that there was here no more than a revocable expression of intention. The case which most closely resembles the present is *Sinnett* v. *Herbert* L.R. 12 Eq., 201: the testatrix Miss Morice had a sum of £358.13.8 in a Savings Bank "to the account Miss Morice of Carrog as trustee for charitable purposes." The question was whether this money was dedicated to charity or formed part of the testatrix's personal estate. Vice Chancellor Bacon said "the £358.13.8 in the savings Bank must be treated as part of the personal estate of the testatrix. The most that could be said of it was, that she set apart this sum and put it into the savings Bank, reserving

to herself the right of disposing of it for such charitable purposes as she might think fit, owing no obligation to any body, having made no communication to any *cestui que trust*, having raised no expectations, but reserved to herself full power to give it or not, as she thought fit."

The words "as trustee" which are absent in the case before this Court did not avail in *Sinnett* v. *Herbert*. Here, as there, there was no evidence of communication of any gift to any *cestui que trust* and see *In re Sinclair's Life Policy*, 54 T.L.R. 918.

I think too that no real distinction can be drawn between the present case and *Gould* v. *Commissioner of Stamp Duties* (1934) A.C. 69, *Scott* v. *Porcher* 3 Merivale, 652, and *Jones* v. *Lock* 1 Ch. App. Cases, 25 cited by Mr. Shearn.

Portion of Mr. Mundell's argument that this property did not pass on the death of the deceased was raised to escape from the requirements of the Estate Duty Enactment that trusts must be evidenced by proper declarations of trust signed by the necessary parties. It is not necessary to consider it, because the assignment to the defendant was made within three years of death and the property was therefore liable to Estate Duty unless it had been effectively given to charity more than three years before the death of the deceased.

I would allow the appeal on this head.

The third head of appeal is against the dismissal of the claim for double duty.

The learned judge appears to have treated this claim as frivolous which in my opinion it clearly was not, covered as it was by section 39 of the Enactment.

But in my opinion the trial judge had a discretion in allowing in whole or in part or in altogether rejecting the claim for double duty.

Section 51 enacts that the Court shall have power to increase, to reduce or to remit any penalty imposed by the Collector under this Enactment. "Increase" of course is limited by the statutory maxima

In my opinion double duty is a penalty. So far as I have observed, the word penalty is not used in any section other than in section 51 and in the marginal note to section 33 (iii).

Section 51 must relate to something, so there must be penalties imposed which the court is empowered to remit.

I can see no difference between "such sum not exceeding one thousand dollars as the Collector may determine" and "double the amount of duty leviable" to which the defendant is also liable.

The duty leviable is determined by the Collector. It is the Collector who assesses. "He shall assess the duty," section 32; "when the Collector has ascertained the amount of duty .....he shall certify," section 34; while "any accountable person aggrieved by the decision of the Collector with respect to the amount of estate duty payable on an Estate duty affidavit may, on payment of or giving security for the amount claimed apply to the Court....and the amount of duty shall be determined by the said Court," section 37.

It is the Collector who imposes the fine of one thousand dollars and it is he who imposes the double duty.

The Enactment does not say that the defaulter shall pay double duty but that he shall be liable to pay it.

Double duty is on a different footing to ordinary duty and it does not become payable unless it is imposed by the Collector. The double duty is just as much a penalty as the thousand dollars, and each is a debt due to the State. If however, the Court can reduce or remit the fine of one thousand dollars, I see no reason why it cannot remit or reduce the double duty: each is in exactly the same position.

The amount of Estate Duty on which an aggrieved person can appeal to the Court under section 37 may well include double duty imposed in respect of a belated or a corrective affidavit and in my opinion in a case to which section 37 applies, the power which the Court is given to determine the amount includes a power to remit or reduce the double duty in appropriate cases.

Any duty or penalty assessed by the Collector is "a debt due to the State" but the Court in determining the duty under section 37, or applying the power given by section 51 when the State sues, is empowered to reduce or remit any sum which is not absolutely imposed by the Enactment. Fines and double duty are not absolutely imposed by the Enactment; they are imposed by the Collector in the exercise of a discretion given him by the Enactment.

Whether the Court remits double duty and other penalties under section 37 or under section 51 is a matter of discretion to be exercised judicially according to the merits of each case.

In the case under appeal the trial judge does not appear to have questioned the *bona fides* of the defendant and having regard to the complexity of the case the defendant may well have thought that no property passed on the death of the deceased and that therefore there was no duty on him to submit accounts.

Had the learned trial judge approached the consideration of the question on these lines he would have acted in a less summary manner, but would have exercised his discretion by disallowing the claim for double duty just as he has done in language of indignation.

We were referred to the new subsection (ii) added to section 51 by the amending Enactment No. 27 of 1936. This new subsection merely gives the Collector the same power in assessing which the Court has under section 37 of imposing a lesser penalty than double the amount of duty, thus perhaps avoiding the necessity for proceedings under section 37. It is a power of imposing a lesser penalty than 100% of the duty.

The appeal on this head in my opinion fails.

The fourth head of appeal is against the order of the learned trial judge directing the State to pay all the costs up to the amendment of the statement of claim. Costs are indemnitory not punitive *Willmott* v. *Barbar* 17 Ch. D. 772 and the usual order for costs in case of amendment is as set out in 1 *Seton's* Judgments and Decisions 7th Ed. p.236 "that the plaintiff do pay to the defendant his costs of this action so far as they may have been thrown away by reason of the said amendments."

Here it is said that the action would have failed, but for the amendment. It is not necessary to consider whether it would or not. The amendment was allowed. In *E. M. Bowden's Patent Syndicate Ltd.* v. *Herbert Smith & Co.* (1904) 2 Ch. 86 the action would have failed but for the amendment. The Court ordered that the costs of the day and any costs thrown away by reason of the necessity for making the amendment were to be the defendant's costs in any event.

That was the order that should have been made and the appeal under this head succeeds.

The fifth head of appeal is against the enquiry ordered as to the value of the property which was taken over by the firm of A.M.S.P. from the Taiping and Bruas firms totalling $302,626.85.

It is argued by the appellant that the various figures which added together make that large sum represent money or property taken over at a valuation and that there is no evidence that the valuation agreed to in 1929 did not represent the value of the property at the death of the deceased.

The learned judge on the other hand held that "between August 1929 and December 1931 there was a great depreciation of property of every kind throughout Malaya." There may have been, but there certainly was no evidence of it.

It is clear that the sums of $7,600, $11,400. $7,600, $11,400, $107.31, $5,500 and $2,108.65 were paid out of the Thavanai account. Mr. Braddell in the Court below said "Every one is agreed that Thavanai means a loan at compound interest subject to those peculiar conditions among chettiars which are called by the name of Thavanai. The account is therefore an account of moneys lent by the deceased to the firm of A.R.S.T.M. on Thavanai." These sums unquestionably represent money, and on their transfer to the defendant's charity account with A.M.S.P. they retained that quality.

The balance of this $302,626.85 is made up of two sums of $216,438.17½ and $40,472.72.13/16 credited as the result of the partition of the Taiping and Bruas firms respectively between the deceased and his partners. The respondent argues that these sums represent property such as houses and rubber estates. I observe that the account in which they are entered is entitled "Account of Payaneri P.R.A.L.M.M. Charity Money." It is a money account.

Moreover, these items are treated as Thavani and interest was credited on it up to 1935. There was no point in paying interest on houses and rubber estates. If there was property of that kind, the account would have been credited with the profits. It will also be observed that in December 1928 Thavanai interest was at the rate 23/32 (see deceased's charity account with the Bruas firm) and that this rate continued to be paid until December 1931. Thus during the period when according to the Judge there was "great depreciation" the interest did not abate, which indicates either that there was no depreciation or, more likely, that these sums of $216,438.17½ and $40,472.72.13/16 were money and did not represent depreciated houses and rubber estates. They were never written down or otherwise treated as non-money assets. The whole account was a Thavanai account—a loan, not a lease—to the moneylender's firm.

The value of the estate must be taken at $302,626.85 at deceased's death and no enquiry should be held.

The sixth head of appeal was against the order that the defendant pay interest at 5% upon the total sum "hereby adjudged" from the date (29th December 1937) until satisfaction. The appellant contends that 5% should have been given.

Prior to judgment the debt to the State carried the statutory rate of 8% interest but that debt became merged in the judgment.

Section 226 of the Civil Procedure Code enacts that the Court may on the decree order interest at such rate not exceeding 18% as the Court deems reasonable. The section clearly gives a discretion as to the amount of interest. Mr. Shearn argued that as the invariable practice of the Court has been to give 8% the normal rule should only be departed from in special cases.

Section 226 does not appear to contemplate any general or normal rate. I think that the Judge has a complete discretion as to the rate of interest to be awarded in each case. The decree may be silent with respect to the payment of interest after judgment in which case the Court shall be deemed to have refused interest: section 226 (ii) so the judge has discretion to award no interest or to award interest up to but not exceeding 18%.

While personally I might have been disposed to award not less than 8% interest, I cannot say that the judge has exercised his discretion wrongly and the appeal under this head is dismissed.

The final ground of appeal was against the order as to the costs of the action, awarding to the State one quarter of its taxed costs as from the 16th December. That was based on the State having succeeded on one out of four issues though the judge says that the fourth (the question of double duty) took up very little time.

The State has succeeded substantially on the appeal. The two orders for costs prior to and subsequent to the 16th December 1937 are set aside.

Having dealt with the appeal proper I now turn to an application made towards the end of the hearing by Mr. Mundell for the respondent.

The application was under section 24 (1) of the Courts Enactment, and Mr. Mundell asked us to say that if there was not a valid gift to charity of the Thavanai money in 1925, there was a valid gift of those moneys to the defendant in 1927 or 1928. He also asked us to find that the deceased's share of the assets of the two firms (by which I understand have to mean the $216,438.17½ and $40,472.13/16 deceased's share of the Taiping and Bruas firms on their dissolution) were also given to the defendant. Any such finding would be in defiance of the book entries, the earliest of which is 14th December 1928, less than three years before the deceased's death.

Mr. Mundell's argument was that A.M.S.P. was a partnership firm (between Muthiah Chettiar's family and the deceased's family) started in October 1927. That was the constitution of the firm according to Somasundaram, a witness for the defendant. The defendant said "that firm was started in partnership between myself and K.A.R. family of Arammanai Sirywayal. My share capital is entered as P.R.A.L.M.M. which is my individual vilasam."

Mr. Mundell relied on a letter dated 16th February 1928 in which the deceased directed Somasundaram to "cause a box to be kept in our house and that our charity money also is given to the above person (S.V.A.N.N. Kannappa) as and when collections are made"; and on a letter of 28th May 1928 from the deceased to Kannappan directing him to "credit in the name of Pajanai P.R.A.L.M.M. (defendant) our charity money etc. that are received from the Taiping firm"; and that there was a good equitable assignment of the money to the defendant.

The defendant raised no such point in his pleading. He pleaded that all the money was the property of charities which negatives the idea of a beneficial gift to the defendant.

I do not think that this letter constituted a gift and the Court of Appeal ought not to decide this new point, even if it is a point of law, unless it is satisfied that the evidence upon which it is asked to decide establishes beyond doubt that the facts, if fully investigated would have supported the new plea. *Connecticut Fire Insurance Co.* v. *Kavanagh*, (1892) A.C. at p. 480.

The letters relied upon direct a transfer from one account to another of moneys with regard to which the deceased had a revocable charitable intention. I would therefore:

1. Allow the appeal against the finding that the property, in respect of which estate duty is claimed, was joint family property, but if the defendant so requires, there must be a new trial on this issue.
2. Allow the appeal against the finding that there was an effective gift to charity in the year 1925 of all moneys standing to the credit of the Thavani accounts in the firms of A.R.S.T.M. Taiping and Bruas of P.R.A.L.M. Muthukaruppan Chettiar (the deceased).
3. Dismiss the appeal against the refusal of the trial judge to award double duty.
4. Allow the appeal against the order directing the plaintiff to pay all the costs up to 16th December 1937, and substitute an order that the plaintiff pay to the defendant the costs thrown away or occasioned by the amendment.
5. Allow the appeal against the order directing an enquiry as to the value of the property as on 4th December 1931.
6. Dismiss the appeal against the award of 5% interest on the judgment.
7. Dismiss the respondent's application for an order declaring that there was a valid gift to the defendant in 1927 or 1928 of the Thavanai moneys and of the deceased's shares in the two firms.

CUSSEN, J.—It is unnecessary for me to state the facts in this case as the judgment contains a full and clear narrative; and, as the learned Judge remarks, "There is no dispute as to the facts of this case but there is a great dispute as to the legal results which flow from those facts."

Of the various questions presented for the decision of this court I will first consider the application by the Plaintiff-Appellant to withdraw the "admission" made by his counsel in the course of the hearing in the Court below.

This occurred in connection with the issue of whether the interest and share of the deceased as a partner in the firms of A.R.S.T.M. (TAIPING) and A.R.S.T.M. (Bruas) were the

separate property of the deceased or were ancestral family property.

A witness named Suppiah Chettiar was called by the Defendant and gave evidence as follows:—

"I live at Singapore. I knew the late Muthukaruppan Chettiar and his brother Thevarayan. Both of them are related by marriage to me, and I have known both of them since boyhood. They had a partition of their joint property between themselves about 20 years ago. They had property to divide between them. They had—

A money lending firm at Singapore,
A money lending firm at Rangoon, and
Houses, lands, jewellery and other movable property in India.

At the time of the partition Thevarayan was about 25 years old. Their father died when I was a small boy, and I cannot recollect him. I myself was about 20 years old at the time of the partition. Thevarayan got, as his share of the partition, a piece of land in India and Rs. 80,000.

Muthukaruppan took over the money lending businesses and other property as his share.

Before the partition Muthukaruppan and Thevarayan lived in the family house at Paganeri.

After the partition Muthukaruppan remained in the family house, and Thevarayan built a house for himself.

About 1 year after the partition Thevarayan started a money lending business at Singapore.

He started it himself, and then I took over as agent. It is still going on. First of all it was P.R.A.L.T. Now its vilasam is only A.L.T. Just at present I am not doing any work."

Thereupon Mr. Joaquim, counsel for Plaintiff, made the following statement:—

"I admit that this last witness had altered my view of the case and that there is now sufficient evidence of a nucleus of ancestral property before the Court. The deceased's interest in the A.R.S.T.M. firms must therefore be regarded as ancestral property in which the Defendant had a coparcenary interest."

The learned Judge accepted this as deciding this particular issue. In his judgment he says:—

"Towards the end of the hearing of this case counsel for the Plaintiff admitted that all the property in respect of which estate duty is claimed must be regarded as having been joint Hindu family property in which the deceased and the Defendant had equal co-parcenary interests,"

and again he says

"It is now common ground that all the property of which he was then possessed must be regarded as ancestral property."

This admission at the hearing put an end to any further evidence or argument on this question.

The grounds on which the Appellant now asks to withdraw that admission are—

(a) that it was an erroneous appreciation of the evidence; that it was as such a mistake by the Plaintiff's counsel.
(b) that it was a mutual mistake by both counsel as to the question of a "nucleus of ancestral property" and the relation of the evidence thereto and
(c) that the withdrawal of this admission will not result in anything unfair to the Defendant.

Now the form of this admission requires careful examination. It is based upon the evidence of Suppiah, and it is, or purports to be, a deduction, an inference therefrom. And the conclusion of fact in issue arrived at (i.e. that the deceased's interest in the A.R.S.T.M. property was ancestral property) must, I think (so far as it is possible to understand the genesis of this admission), proceed from the premise on which it is based by some application of the principles of Hindu Law relating to joint families.

That must necessarily have been the case because it can certainly be claimed beyond any dispute that in the evidence of Suppiah there is no direct statement that the property in question was joint family property; in fact the direct effect of his evidence is to the contrary.

What we have here then is, it appears to me, a clear case of mistake; a conclusion of fact arrived at as an inference from accepted evidence before the Court; and not an independent objective admission of a fact.

In seeking to withdraw this admission the Appellant is not in any way attempting to impugn the evidence of Suppiah; he is not withdrawing any admission implying any knowledge himself of the fact in issue; it does not in any way affect the position of the Court which is that the Court must now exercise its own judgment on the evidence instead of accepting the judgment of Appellant's counsel.

It seems to me that to allow the Appellant to withdraw this admission cannot result in anything unfair to the Defendant; he will be in just the same position as he was before the admission was made as regards the case. He would, of course, be entitled to any costs incurred which would not have been incurred if this admission had not been made.

So much for what I may term the merits of this application to withdraw this admission.

A number of cases were cited by counsel, but I do not propose to set out here my examination of them, except to say that I did not find in any of them any very close parallel to the present case except the local case of *Foo Nghit Tse*, Plaintiff-Appellant, v. *Yau Yok Wah*, Defendant-Respondent (Perak Civil Appeal No. 10/1929).

This case, in my opinion, directly supports the application of the present Appellant.

As regards those cases which dealt with procedure and where it was held that the only remedy was an action to set aside the judgment they are not, in my opinion, relevant, because the procedure in our Civil Procedure Code is different from the English procedure.

If the matter of this admission was the only question the Plaintiff wished to raise then his proper procedure, in my opinion, would have been to apply to the Lower Court for a review of judgment under section 579 of the Civil Procedure Code (Cap. 7). The words "for any other sufficient reason" in that section are, I consider, wide enough to admit the claim of the Plaintiff to be allowed to withdraw this admission. And under section 27 of the Courts Enactment (Cap. 2) this Court of Appeal has all and every power which the Court below possessed.

The application to withdraw this admission should be allowed on the terms of the Plaintiff-Appellant paying the costs of this application and any costs thrown away by the fact of the admission having been made. The issue in question should be remitted to the Lower Court with a direction to hear and decide it, allowing both parties to call further evidence, the final decree in this suit to follow the finding of the Lower Court on this particular issue.

The next question for consideration is the appeal against the order as to costs made by the learned Judge in granting the Plaintiff's application for leave to amend his plaint.

The learned Judge ruled:—

> "If leave to amend was refused, the Plaintiff's suit would certainly fail. I therefore give him leave to amend as prayed, but he must pay all the Defendant's costs up to date to be taxed as between party and party. The Defendant is also to be at liberty to amend his defence in any way he may be advised."

The reason for the order made appears then to have been that if the plaint were not amended the suit must certainly fail.

This is a conclusion with which I do not agree. In my opinion the proper order to have made was that the Plaintiff pay the costs of and occasioned by the amendment.

The appeal should be allowed on this issue, the order of the Lower Court set aside and an order made that the Plaintiff do pay the costs of and occasioned by the amendment of his plaint.

The next question I will consider is the claim of the Plaintiff-Appellant to "double duty" under section 30 of the Estate Duty Enactment 1929 (which is the relevant Enactment).

Section 30 reads:—

> "30(i) If any person takes possession of or in any way administers any part of an estate in respect of which duty is leviable on the death of any person or of the income of any part of such estate without obtaining representation of such estate or without delivering an account, as the case may be, within six months after the decease or within two months after the termination of any action or proceeding respecting the will or the right to representation, if there be any such which is not ended within four months after such decease, every such person shall be liable to pay such sum not exceeding one thousand dollars as the Collector may determine and shall also be liable to pay double the amount of duty leviable, and the same shall be a debt due to the Ruler of the State in which the debt arises and shall be recoverable in accordance with the law for the recovery of State debts.
>
> (ii) Where any proceeding is instituted for the recovery of estate duty in respect of any property, the Supreme Court may appoint a receiver of the property and the rents and the profits thereof and may order a sale of the property."

The learned trial Judge dismissed in very brief words the claim that the Defendant pay double the amount of duty leviable. But this issue appears to me to require some more consideration than appears to have been given to it in so dismissing the claim.

It must depend upon the proper construction of section 30 and of section 50 of the Enactment. Section 50 reads:

> "50(i) The Court shall have power to increase, to reduce or to remit any penalty imposed by the Collector under this Enactment in any proceeding for the recovery of such penalty."

Under section 30 there arise two amounts—sums of money—which are declared to be debts due to the Ruler of the State and recoverable as such.

Firstly any person who makes default as set out in the section either by not obtaining representation or by not delivering an account is liable to pay a sum of money, the amount of which up to a limit of $1,000/- is determined by the Collector.

Secondly the same person is liable to pay double the amount of duty leviable.

That the words "the same shall be a debt due to the Ruler of the State....." apply not only to the "double duty" but also to the sum deter-

mined by the Collector is evident from the similar provisions in section 42(ii) and section 43(iii) where sums similarly determined by the Collector are declared to be debts due to the State and recoverable as such.

When therefore the State proceeds by Civil Suit for the recovery of the debt of the sum being the amount of the double duty and has established by evidence the conditions of default set out in the section as giving rise to the liability for this debt, the claim being in debt the Court, in my view, must give judgment for the State unless it can be held that the provisions of section 50 apply. In other words it must be held that this debt—the sum of double duty—is a penalty imposed by the Collector. The answer to that question appears to me to be this.

Consider the two cases—(1) a suit by the State for, say, $600; as determined by the Collector; (2) a suit for double the amount of duty leviable.

What evidence must the State bring before the Court in each case in order to establish the liability of the Defendant?

In case (1) the State must prove (a) that the Defendant has taken possession of or administered the estate without obtaining representation or delivering an account, and (b) that the Collector has made an order imposing as a penalty the sum of $600/-.

Whereas in case (2) it is only necessary for the State to prove (a).

When (a) is proved the liability at once attaches; whereas in the first case the liability only arises when the Collector has made an order.

That being so, in my opinion, the claim to "double duty" is correct, and accordingly whatever sum is leviable as duty in respect of the Estate of the deceased in this case as finally determined, the Plaintiff is entitled to judgment for double that amount.

I will now consider the appeal against the finding of the learned trial Judge that there was an effective gift to charity in the year 1925 of the moneys standing to the credit of the deceased's Thavanai accounts in the Taiping and Bruas firms.

This is perhaps the most important and difficult question in this appeal.

The finding on this issue is set out in the Judgment as follows:—

> "Now as to the first of these three questions, in my opinion there was an effective gift to charity in the year 1925 of all moneys standing to the credit of the deceased's Thavanai accounts in the Taiping and Bruas firms. I am also of opinion that that gift comprised all interest and other accretions earned by those moneys since the date of their respective transfers to the P.R.A.L.M. charity account in the books of the two firms. It may, perhaps, be helpful to add that, in arriving at this conclusion, I have been influenced by the fact that in this case we are dealing exclusively with Chettiar societies, Chettiar partnerships, Chettiar accounts and Chettiar charities. Had we been dealing with English societies, English partnerships, English accounts and English charities, the result might have been a different one."

The Appellant attacks this finding on the following grounds—

He argues (1) that the existence of the Donee—the charity—is nebulous;

(2) that there was no communication of the gift to the Donee;

(3) that the entries made in the books of account do not show a legal or equitable assignment but were merely an ear-marking of the deceased's own money;

(4) that *bona fide* possession and enjoyment were not assumed by the Donee on the gift and thereafter retained to the entire exclusion of the Donor.

Now, in the first place, what is the evidence as to the existence and nature of these charities?

The first account available in the evidence is that given in the sworn statement of the Defendant made to the Collector of Estate Duty on 28-11-35. He describes the five charities as being—

(1) Vetheranniyam Auna Chuthiram (Feeding Poor);

(2) Tirukalarkum Pusai Madam (Worshipping Place);

(3) Thevara Padusalai (School);

(4) Kalayar Kovil Tirumai Malai Padasalai (School);

(5) Pahaneri Thevara Koshti (Worshipping Place).

He tells us there that these schools and places of worship were built with moneys from the firm of A.R.S.T.M., but in his evidence on commission in India he corrects this and says "I desire to state that these places were built with charity moneys then available in India and not from moneys drawn from A.R.S.T.M."

Of these five charities Defendant tells us in his evidence that two (i.e. Nos. 2 and 4 above) were started some years before 1925. The other three were started some time in 1925 (at "Vaikasa Krodana.")

Accepting this evidence, and it must be accharities. They consist of two schools, two cepted, I see nothing nebulous about these

places of worship, and an alms charity. In my opinion this evidence sufficiently establishes the objective existence of the charities. They are family charities, in the sense that they are maintained and conducted by the joint family, but they are none the less public in their nature.

The reference to two of these charities in the letter of 20.5.25 from the deceased in India to A.R.S.T.M. is important. He writes:—

> "The house-warming ceremony for the Vedaramyam Choultry is fixed for the 14th instant. The house-warming ceremony for the Thirukkaral Kurupupai Thevaram Patasalai (free religious school) is fixed for Wednesday the 21st instant. I shall celebrate the above two events grandly and write to you,"

Here is clear evidence of the formal and public inauguration of these two charities.

The deceased, as the head of the joint family, was properly in charge of these places and of the funds thereof; in fact he was in the position of a Manager and Trustee and occupied such position both before and after 1925.

In my opinion then we have established two things, i.e. the existence of these charities and that the deceased was a Trustee for these charities.

What then is the position as regards the gift in 1925?

The deceased was at that time and had been since about 1904 a partner in a money-lending firm known as A.R.S.T.M. carrying on business at Taiping and at Bruas. The other two partners were Muthu A.R.S.T. who had contributed $6,250/- of the share capital and K.A.R. whose share was $2,250/-, the share of the deceased in the capital being $4,750/-.

The agent in Malaya of the firm both at Taiping and Bruas was the witness Somasundaram Chettiar, who held that post from 1921 to 1929.

Deceased had, as appears to be the custom in such firms, a Thavanai or Deposit account in the firm's books. Such Thavanai accounts, as I understand them, represent sums left on deposit or loaned to the firm, and are credited with a regular Thavanai rate of interest. In respect of the credit balance in such an account the deceased was in the position of a creditor of the firm.

Then on 20.5.25 the deceased, in the course of a general letter about the firm's business to Somasundaram, the agent, gives him instructions to transfer the amount to his credit in his Thavanai or Deposit account to a new account to be opened in the name of "P.R.A.L.M. Charity."

The agent carries out these instructions, opens a new account entitled "P.R.A.L.M. Charity," transfers to it all the credit balance in the deceased's Deposit Account and closes that Deposit Account.

"P.R.A.L.M." is the personal as well as the family vilasam of the deceased—I mean the family vilasam of the joint family consisting of himself and his son—the Defendant.

It appears to me that in this transaction we have present all the necessary elements to constitute a valid and complete gift.

The deceased was already a trustee for these charities. He desires to make a gift of money to provide an endowment fund and so he orders his 'Bankers' to open an account in his name as a Trustee for charity and to transfer to the credit of such account the sum on deposit in his personal account.

I do not see that in law it makes any difference that the Donor and the Trustee to whom the gift is made are one and the same person. If it did it would be difficult, if not impossible, for a person who happened to be the sole Trustee of a charity to ever make a donation to the funds of the charity.

As to the objection that *bona fide* possession and enjoyment had not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise as required by section 5(iii) of the Enactment, I consider that his possession of these monies as Trustee excluded his possession as Donor.

As regards enjoyment it is argued that there was no enjoyment because no payments out were made from this fund for the purposes of the charities. As regards this I would state, firstly, that enjoyment in the meaning of the section does not, in my opinion, require expenditure or dissipation of the fund. I am in the possession and enjoyment of my credit balance at the bank even though I do not in fact draw upon it; I am in possession and enjoyment of a radio set in my house even though I never use it.

But in fact there was expenditure from this fund if we accept the evidence of the Defendant when he tells us that the charities were being conducted and in answer to the question "From which funds are the charities being conducted?" he replies "On account of the fall in the price of rubber we are not in a position to get money from Taiping and so I have been spending from my private funds and debiting those sums spent against the charity."

Finally as regards the method of creating this charity fund and the denoting of it by the vilasam with the word charity added, i.e. 'P.R.A.L.M. Charity' it is of interest to refer to the case of *Palaniappa Chettiar* v. *Shanmugam Chettiar*, I.L.R. XLI (1918) Madras 815. The following passages from the judgment of Wallis, C.J. are relevant:—

"The family charity was constituted in 1887 pursuant to Exhibit K a letter addressed to P.L.R.M. firm at Madras in which it was stated that the family had set apart the three villages named and Rs. 50,000";

"for charity and the P.L.R.M. firm were directed to credit Rs. 50,000 separately under the style of P.R.P.L.S. for the charity and carry on dealing separately for the Choultry under that style" (page 818—819);

and at page 821—

"Here the first defendant described himself (in signing the Hundi (Bill) on which the suit was brought) as 'P.R.P.L.S. huklar.' P.R.P.L. was the vilasam of the whole family. 'S' admittedly signifies Chatram (a charity institution) so that he described himself as huklar of the P.R.P.L. Chatram."

The text of the letter K is given at page 816 as follows:—

"As soon as this letter is received, on this date take Rs. 50,000, credit it separately under the style of P.R.P.L.S. for the choultry and carry on dealings separately under the said style for the said choultry. Maintain ledger and day book separately therefor."

The first one of the five charities in the present case is a Chatram (it is spelled Chaittiram but is the same word).

I am therefore of the opinion that the decision of the learned Judge on this issue of the gift to charity in 1925 was correct.

Two other matters remain for consideration, and I will deal with them briefly.

The first is the appeal against the order directing that the Registrar hold an inquiry 'as to the property in respect of which estate duty is payable in accordance with this judgment and the principal value thereof on the 4th December 1931.'

I consider the contention of the Appellant, on the evidence, is correct—that the firm of A.M.S.P. took over the Taiping and Bruas firms as the share of the deceased on dissolution of these two firms certain properties at a valuation. These properties as such were then absorbed into the assets of the A.M.S.P. firm and in lieu of them the deceased was made a creditor of the firm for the amount of the valuation.

That sum of money remains to the credit of his deposit account in the books and is regularly credited with interest.

That sum of money is, in my opinion, the estate on which duty is payable.

The order for inquiry should therefore be set aside and the value of the estate on which duty is to be paid is to be taken as the amount as stated in the account books of A.M.S.P.

The other matter is the appeal against the rate of interest at 5 per cent allowed on the amount of the decree to the date of payment. This interest is allowed under section 226 of the Civil Procedure Code (Cap. 7) and is to be at such rate as the Court deems reasonable. It is therefore a matter in the discretion of the Court properly exercised.

In my opinion in a matter of this nature there must be established by the Court a normal rate of interest to be given in all similar circumstances and the discretion of the Court in individual cases is to be exercised as a departure, for some reason peculiar to the particular case, from the normal rate.

It has been stated fom the Bar that for some time the Ipoh Court has adopted a general rate of 5 per cent. and so in this case has been only following the general rule in operation at any rate in Perak. Although that rate is, so far, different from the rates in force in Selangor and elsewhere and as stated by counsel in the neighbouring Courts of the Colony (where it is 8 per cent), and although I consider uniformity should be more general and embrace all the area of jurisdiction of the Supreme Court of the Federated Malay States, I do not think the rate fixed by the Court below should be interfered with.

One other matter remains to be considered.

Counsel for Defendant-Respondent acting under section 24 of the Courts Enactment (Cap. 2) in effect appealed against the decision of the Lower Court which held that there had been no gift to charity or to the Defendant of the share of the deceased in the Taiping and Bruas firms until 1929, when, falling within the period of three years before the death of the deceased, estate duty was payable.

Counsel relied upon the evidence of the witness Somasundaram as to a conversation with the deceased in India some time in the year 'Prabasa' (1927) when he states that the deceased told him 'that they have set apart the whole firm for charity and gave me instructions also,' and also upon two letters from the deceased in India—the first dated 16.2.28 to the firm A.R.S.T.M., announcing the arrival of one Kanappa Chettiar to take charge of the firm of A.M.S.P. which states "On arrival please cause a box to be kept in our house and that our charity money also is given to the above person as and when collections are made," and the other letter dated 28.5.28 to Kanappa Chettiar in which he writes:—

"Please go on crediting in the name of Paganeri P.R.R.L.M.M. our charity money etc. that are received from the Taiping firm" and ir which he directs Kanappa to send a Power o Attorney for his (deceased's) signature em-

powering Kanappa, *inter alia*, "to get division and collect my share of capital and profits, to collect the principal and interest of the charity money in my name."

These letters are of course more to be relied upon than the oral evidence of Somasundaram, which is, to some extent at least, in contradiction with his contemporary conduct.

I can see nothing in these letters to in any way indicate a gift of the share capital and profits to charity.

In fact, as I read the above extract from the second letter, the contrary appears as there is set out a clear opposition and contrast between the 'share of capital and profits' and the 'principal and interest of the charity money'—which latter is of course the Thavanai or Deposit money.

That, in my opinion, suffices to dispose of this cross-appeal.

This, I think, concludes all the matters raised for determination in this appeal.

MURRAY-AYNSLEY, J.—This is an estate duty case.

The appeal raises various considerations. First the property on which duty is payable, secondly the rate at which duty is payable and thirdly a question of costs. I think that it is most satisfactory to deal first with the question of the property upon which duty is payable.

The deceased who died on the 4th of December 1931 in India was one P.R.A.L.M. Muthukaruppan Chettiar, and was for many years a partner in two money lending firms in Taiping and Bruas in this State known as A.R.S.T.M. It is common ground that in 1929 all the interests of the deceased in A.R.S.T.M. were transferred to a new firm A.M.S.P. in which the Defendant an adopted son of the deceased and not the deceased was a partner and that thereafter at any rate the deceased had no property in the State.

In addition to this transaction there were other transactions between the years 1925 and 1929 and it has to be determined whether before the crucial date of the 4th of December 1928, the deceased had divested himself of any or all of his property in the estate.

The interests of the deceased in what may be conveniently referred to as the Taiping and Bruas firms consisted in:—

(a) Monies on Thavanai in both firms,

(b) The interest of the deceased in the partnership consisting of capital and money lent to the firm on current account.

Aitken J. held that the deceased made an effective transfer of the former but not of the latter before the 4th of December 1928. There is no cross-appeal, therefore all that has now to be considered on this head is whether the finding of the learned Judge is right on that part. The consideration of this is raised by Ground II in the Memorandum of Appeal.

The deceased is alleged to have parted with his interest in the Thavanai monies in this way:—

> On the 20th of May 1925 he wrote a letter to the agent of the firms a letter which contains the following passage (Record p. 31).
>
> "Accordingly make debit entries of the deficit in the old account according to shares against the respective partners, and enter credit of the amount retaining to our credit as P.R.A.L.M.'s Charity money and adjust P.R.A.L.M.'s account and make without delay copy of the day books and interest from inception."

After the receipt of this letter the agent closed accounts in the Taiping and Bruas firms which were headed "Thavanai account of Paganeri P.R.A.L.M." (p. 243) and "Paganeri P.R.A.L.M. extra contribution to capital" (p. 257) and opened new accounts entitled "Thavanai account of Paganeri P.R.A.L.M. Charity" (p. 246) and account of P.R.A.L.M. charity" respectively.

In spite of the different names used all these accounts appear to have been Thavanai accounts according to the usual practice of chetty firms.

It is contended that by this transaction the deceased either by assignment or declaration of trust parted with his beneficial interest in these accounts, and such beneficial interest became vested in certain charities in India. The names and purposes of these charities are briefly set out on p. 206 of the record. Now although it is probable that the deceased was at that time expending money on those purposes in India and also probable that those purposes would be charitable in a legal sense there is no evidence that the deceased or any one else was under any legal obligation to continue to spend money in that way. There was no evidence as to the actual organisation of those charities and no notice was given of the transactions to any one representing the charities and further none of the money at any time found its way to or was actually spent for the benefit of the charities. What conclusion then should be drawn as to the effect of the transactions in these circumstances.

For the Respondent it is contended that it must be concluded that the deceased either assigned or made a declaration of trust. Since it cannot be contended that there could be any assignment to anyone except to the deceased himself it would seem that there must be, if anything, a declaration of trust. Can one find anything of that kind? It is probable that the deceased intended to benefit the charities, but can one find that the deceased further intended that not only might the money be applied for charitable purposes but that it could not lawfully be applied to any other? There is not in my opinion anything which would justify the Court that there is more here than in the more familiar transaction where a person for his own convenience opens a special account in a bank for a special purpose, perhaps charity. A man might for instance open a special banking account out of which to meet his intended contributions to charity and he might pay therein certain sources of revenue, but in my opinion there is nothing in such a transaction which could prevent him from using monies from that account for any purposes he chose. Such an arrangement is not an assignment nor a declaration of trust; it is merely something for the convenience of the person using it. I cannot find anything more than that in the present case. My opinion is strengthened by the fact that as I said before none of this money actually found its way to charity. The charitable contributions of the deceased came from other sources and no debit was made ever by way of book entries against these funds. To reach this conclusion it has not been in my opinion necessary to rely on any technical considerations. I have merely drawn an inference as to the intention of the deceased from the facts before me.

In the course of the hearing of the appeal the attention of the Court was drawn to two other letters of the deceased dated the 16th of February 1928 and the 28th of May 1928 (pp. 214, 215). In my opinion these letters addressed to servants of the deceased do not indicate anything more than an expression of intention and the letter of the 16th of February 1928 is merely a revocable mandate.

The result of this finding would be to render the whole of the interest of the deceased in the sum of $302,625.85 liable to death duties, but on this point two subsidiary questions arise:

(a) is the whole of this to be considered the property of the deceased or did he only enjoy an interest therein as member of a joint family by Hindu Law; if that were so, on the facts of the present case only one half of this sum would be considered the property of the deceased. This depends on a question of fact whether the property in question was joint family property. This is raised in Ground I of the Memorandum of Appeal.

(b) The other question is, is this sum of $302,625.85 which is the value of the assets at the time of handing over to be taken as the value for death duty purposes or must an enquiry be taken as to the value of such assets at the time of death. The learned Judge ordered an enquiry by the Registrar. The Plaintiff also appeals against this finding. This is raised in Ground V of the Memorandum of Appeal.

I will deal with the two points in detail.

In the Court below one of the questions raised and a very substantial question was whether the property in question was joint family property. If this were so duty would only be payable, as I have said, on half the value of the property in question representing the quantum, viz one half, of the interest of the deceased in the property, it being admitted that the deceased was subject to the Hindu law of the Methakshara school.

Aitken J. found for the Defendant on the issue in the following circumstances. After evidence had been given on behalf of the Defendant, Mr. Joaquim who then appeared on behalf of the Plaintiff made an admission on the following terms (R. P. 88).

> "I admit that this last witness had altered my view of the case, and that there is now sufficient evidence of a nucleus of ancestral property before the Court. The deceased's interest in the A.R.S.T.M. firms must therefore be regarded as ancestral property in which the Defendant had a coparcenary interest."

At that stage the case for the Defendant had not been closed.

It seems clear that on the evidence as it stood there was no justification for this admission by counsel as in view of the evidence that the firms A.R.S.T.M. were in existence before 1918 and that they did not form part of the subject matter of the partition of the deceased and his brother in that year it seems clear on the evidence dealing with Hindu Law before us that the question of a nucleus was immaterial and

that the admission must have been due to a misapprehension of counsel as to the law (Hindu) dealing with the subject.

We have now to consider whether the admission made by counsel in such circumstances precludes further enquiry into the matter.

The effect of this admission was to render further proof unnecessary and the Judge was justified in view of such admissions in finding for the Defendant on that issue. There is no direct authority on the point. I think recourse must be had to general principles; on the one hand there is the duty of Courts to administer justice, on the other the practical inconvenience which would result if admissions so made could be withdrawn. I think the only principle that should guide a Court in this matter is whether the practical inconvenience of allowing a reopening of this matter outweighs the possibility that an injustice has been done. As the case for the Defendant had not closed one cannot in absence of knowledge of what the Defendant might have proved put it at any higher than a possibility. But from the point of view of inconvenience it is of importance to note that a finding on this issue leaves undisturbed the findings on the other parts of the case. A finding in favour of the Plaintiff would have the effect of doubling the value of estate on which duty would be payable; it would not have the effect of rendering property liable that would be otherwise exempt or *vice versa*. A suitable order for costs would safeguard the Defendant from any hardship.

Weighing these two together after consideration I have come to the conclusion that this Court ought to allow the matter to be reopened and that a new trial should be ordered on that issue only; the question of costs I will deal with hereafter. In arriving at this decision I am considerably influenced by the affidavit made by the Defendant to an officer of the Estate Duty Department of the F.M.S. (Record pp. 206, 207).

Ground V of the Memorandum of Appeal raises a rather difficult question as to the basis of assessment in this case. It is admitted that in 1929 the interests of the deceased in A.R.S.T.M. of Taiping and Bruas was transferred to a new firm A.M.S.P. of which the Defendant was and is a partner. Some of this was sums of money representing the balance of the Thavanai account previously dealt with, the remainder representing assets other than money handed over as a result of the arbitration on the dissolution of the former partnerships. All these were credited in an account in A.M.S.P. headed P.R.A.L.M.M. charity money. This account gives credit for sums of money only and interest is credited at three monthly periods as in a Thavanai account (Record pp. 265 and 266). In form therefore this appears to be a loan to the firm. It should be noted that according to the capital account (p. 275) the Defendant himself was partner. The letter of deceased of 28th May 1928 is also significant on this point. The share was debited to the Defendant personally and therefore it would appear that on the inception of the firm there was an intention to treat the account entitled charity money as a debt due to the firm but to keep the question of partnership distinct. It is to be noted that at a much later date namely in November 1935 the account was debited with the Defendant's contribution to the capital of A.M.S.P. and also with a proportion of the losses. This I consider to be only an after thought and made at a time when the question of estate duty was probably in contemplation. I consider that at the time of the death of the deceased and at the time of the transfer from A.R.S.T.M. to A.M.S.P. the asset in question was a debt due by the firm to the Defendant as trustee for charity. The significance of that for death duty purposes is that in the absence of any evidence that the firm was insolvent it must be taken at its face value, and its value is not subject to fluctuation as would an interest in the partnership. In any case if I were wrong on this point in view of the complete default of the defendant in making any return for estate duty purposes showing the value of the interest in the A.M.S.P. the Collector would be entitled to value them at the value at which they appeared in the books of A.M.S.P. at the time of the death of the deceased. No evidence was produced to show that the figure in the books is incorrect and there was no writing down of this amount until as I have said some years after the death of the deceased.

The result of this finding is that duty is payable on the whole or the half of $302,625.85, whether on the whole or the half depending on the result of the trial of the issue whether the property on which duty is payable was separate property of the deceased or joint family property.

The next point to be considered is whether single or double duty is payable on such sum as the retrial may show to be the value of the estate. This is raised in Ground III of the Memorandum of Appeal. Section 30 of the Estate Duty Enactment renders persons liable under certain circumstances to pay double duty which then becomes a debt due to the Ruler of the State. In this case it cannot be doubted that the

circumstances set out in Section 30 have arisen and that the Defendant is liable to pay double duty. The use of the words a "debt due to the Ruler of the State" indicates in my opinion that the Court has no discretion unless the matter comes within the ambit of Section 51. In my opinion it does not. I consider that penalties imposed by the Collector refers only to these sections where the Collector is expressly empowered to enforce penalties as in Section 33 (iii) and that judgment should be for double duty on the whole or half of $302,625.85.

Ground IV of the Memorandum of Appeal deals with the order for costs made by Aitken J. when an application was made during the hearing by the Plaintiff for leave to amend. The amendment sought if necessary was of a rather technical character and it is significant that no adjournment was asked for by the other side. In my opinion the proper order would have been that the Plaintiff should pay the costs of and occasioned by the amendment and that the appeal should be allowed on this ground.

A minor point was raised in Ground VI of the Memorandum of Appeal as to the proper rate of interest after judgment. Aitken J. allowed 5% which has been the rate allowed recently in Perak. In Selangor it appears that 8% has been allowed. It is certainly undesirable that this divergence should exist, but I am not of opinion that there is any ground for inferring a wrong exercise of the discretion given to the Judge. I consider that on this point the decision of the Judge should stand.

Appeal partly allowed & partly dismissed.